IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 51 OF 2002.

Shri Alfredo Fernandes,
H. No. 115, Curpem,
Agramorod, Paroda, Goa. ... Appellant.

Versus

State through the Police
Inspector, Quepem. ... Respondent.

Mr. M. Rodrigues, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 4th September 2003.

ORAL JUDGMENT.

The appellant, who has been convicted by the District and Sessions Judge, South Goa, Margao, for an offence punishable under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 10,000/-, in default to undergo simple imprisonment for one year, by Judgment, dated 27th September 2002, in Sessions Case No. 34 of 2001, has filed the present appeal challenging the aforestated conviction and sentence.

2. The facts in brief as are necessary for the decision of the appeal are stated hereunder:-

P.W.8 Harish Madkaikar was in-charge of the police station at Quepem. On 27th January 2001, he

recorded the complaint of P.W.1 Sofia Dias, at Exhibit 14. P.W.1 Sofia was referred to Primary Health Centre, Kakoda, for medical examination. The Primary Health Centre, Kakoda, referred her to the Goa Medical College, Bambolim. She was examined by P.W.2 Dr. Silvano Dias Sapeco, who noticed that her hymen was not intact. There were old tears at 5 and 8 o'clock position of hymen. Abdominal ultrasonography, dated 29th January 2001, revealed single live intrauterine foetus of approximate 26 weeks of gestation. The report of examination of P.W.1 Sofia is at Exhibit 18. Exhibit 19 is the certificate of pregnancy. Exhibit 20 is another report showing that P.W.1 Sofia was pregnant. P.W.1 Sofia was, thereafter, referred for Gynaecology examination. Dr. Prasad Neurenkar in his report, at Exhibit 21, has confirmed that P.W.1 Sofia was pregnant of 26 weeks duration. P.W.1 Sofia was, thereafter, referred for blood grouping and, vide Exhibit 22, her blood group was determined as "B" Rh Positive. Exhibit 23 is a requisition for ultrasonography and the certificate of the Radiologist is at Exhibit 24. The accused was arrested and was produced for medical examination. He was also examined by P.W.2 Dr. Sapeco. Exhibit 25 is the letter requesting for examination of the accused. After examination of the accused, P.W.2 Dr. Sapeco opined that there was nothing to suggest that the accused was impotent and in the absence of

positive physical findings, no opinion as to recent forcible sexual intercourse could be given. The report of examination of the accused is at Exhibit 26. The accused was referred for blood grouping and, vide Exhibit 27, his blood group was determined as "A" Rh Positive. Vide Exhibit 28, the samples of vaginal swabs, vaginal smear slides, pubic hair, nail clippings, etc., were forwarded for examination. The urine sample of P.W.1 Sofia, vide Exhibit 29, tested positive for pregnancy. Subsequently, P.W.1 Sofia delivered a male child and the blood group of the child was determined as "B" Rh Positive.

3. P.W.8 P.S.I. Madkaikar conducted the scene of offence panchanama, which is at Exhibit 36, and also attached the clothes of P.W.1 Sofia under the same panchanama. The muddemal property was sent to the Chemical Analyser and the report of the Chemical Analyser is at Exhibit 45. After completion of the investigation a charge-sheet against the appellant/accused came to be filed.

4. After committal of the case to the Court of Sessions, the learned District and Sessions Judge, South Goa, Margao, vide Exhibit 6, framed a charge against the appellant/accused for an offence punishable under Section 376 of the Indian Penal Code. The

appellant/accused denied his guilt and claimed to be tried. The prosecution in support of its case examined 9 witnesses. The learned trial Court accepting the evidence of the prosecutrix P.W.1 Sofia, corroborated by the evidence of her mother P.W.3 Marcelina Dias and the medical evidence, found the accused guilty and sentenced him as aforestated.

5. P.W.1 Sofia's date of birth, as per the Baptism Certificate, is 7th November 1986. The appellant/accused is alleged to have committed rape of the prosecutrix six months prior to 27th January 2001. The prosecutrix, admittedly, on the date of commission of the offence was below 16 years of age. P.W.1 Sofia states that she had studied upto 5th standard and, thereafter, had left school. Her father was working in the fields and her mother was also doing agricultural work. According to her, the appellant/accused is a blacksmith. The accused had also a plough, which he used to give on hire to others. The accused has cattle also. According to her, her parents used to go to work at 8.00 a.m. and return at 6.00 p.m. and some times, when they went for planting paddy, they would return at 12.00 midnight. After her parents used to go to work, she used to remain alone in the house. According to her, her father and his brother reside in a common house but both the families reside separately. Even in the

house of her uncle no one remains present during the day. She further states that the accused used to come with his cattle close to her house in a field, which remains uncultivated. The accused used to come to her house 'and make fun'. At that time she and the accused were alone in the house. The accused, thereafter, started touching her. One day the accused took her into the house in the prayer room and made her to sleep on the floor. The accused removed her underwear and had intercourse with her. The accused had also removed his pant, which he was wearing. After having intercourse, the accused told her that she should not tell her mother. P.W.1 Sofia further states that the accused had intercourse with her many times, at least on 5 occasions. On all the occasions no one else was present in the house.

6. She further states that after she had conceived, she informed that fact to her mother. She met the accused and informed him about the pregnancy and also asked him to get married to her. The accused informed P.W.1 Sofia that he would not marry her and, therefore, P.W.1 Sofia went to the police station with her mother and lodged a complaint. In the cross-examination she has admitted that after the accused began patting her, she had gone for confession and had confessed to the priest. She admits that the

priest had not told her to desist from doing it. She also admits not to have informed her mother about the cessation of her menstruation cycle. She has further admitted in the cross-examination that her mother came to know about her pregnancy because of the enlargement of the stomach, even before P.W.1 Sofia informed her mother about the pregnancy. She has further admitted in the cross-examination that she was in love with the accused. She has admitted that she used to remove the lice from the hair of the accused. She has further admitted in the cross-examination "it is true that I had not told my parents or my uncle or aunty what the accused was doing to me because the accused had threatened me." She has denied the suggestion that five other persons were responsible for her pregnancy. She has also denied the suggestion that the accused did not have forcible intercourse with her.

7. P.W.3 Marcelina Dias, mother of P.W.1 Sofia, states that Sofia is her eldest child. She has another daughter by name Jessy. She used to go to the agricultural field to work as a labourer. She has further stated that whenever she was going out to work, P.W.1 Sofia used to remain alone in the house. She has stated that she questioned Sofia whether she was pregnant and Sofia answered in the affirmative. She further states that she asked Sofia as to who was

visiting her and Sofia told her that it was the appellant/accused. Thereafter, she had gone to the police station and Sofia had lodged a complaint at the police station. According to her, after filing the complaint, the accused had come to her house and had denied that he was responsible for the pregnancy of Sofia. The accused then went home and returned with his mother and the mother of the accused abused Sofia as well as P.W.3 Marcelina. According to her, Sofia delivered a child in the Hospicio Hospital. In the cross-examination she has admitted that one Antonia, who is related to her husband, one day had questioned her whether she had seen the state of her daughter Sofia. She has admitted, as correct, that the said Antonia had told P.W.3 Marcelina that her daughter was pregnant. P.W.3 Marcelina has volunteered that this was told to her by Antonia after P.W.1 Sofia had informed her. In the cross-examination she was asked the question whether she knew the persons who used to come to her house in her absence and she replied by stating that the appellant/accused and one woman used to come to graze cattle near her house. She has admitted that after reporting the matter, the accused and his mother had come to her house. She has also admitted that the accused had come to her house alone on the next day of lodging the complaint. In the cross-examination she has also admitted that she had met Antonia while going to

work and the said Antonia had informed her that she had heard some ladies talking in the paddy field that Sofia was pregnant.

8. P.W.6 Jessy, sister of P.W.1 Sofia, states that she had seen the appellant/accused talking to Sofia many times, whenever she returned home early from school. She states that once she saw the accused talking to Sofia and the accused had asked her as to why she had come home early and had driven her out of the house.

9. Mr. Rodrigues, the learned counsel appearing on behalf of the appellant, has urged before me that the evidence of P.W.3 Marcelina cannot be believed as pregnancy of 5 to 6 months cannot go unnoticed. He has further urged that there is an enormous delay in the lodging of the First Information Report and the delay, therefore, casts a reflection on the truthfulness of the allegations. He has also urged that the conduct of P.W.1 Sofia of not disclosing about the pregnancy to any one also casts a reflection on the veracity of the statement of P.W.1 Sofia. He has also urged that the First Information Report came to be lodged only on the refusal of the accused to marry her. According to him, no DNA test, though recommended by P.W.2 Dr. Sapeco, was conducted to establish the paternity of the child.

He has also urged before me that the appellant/accused was not given an adequate opportunity of leading defence evidence and, as such, this Court should remand the matter to the trial Court to enable the appellant/accused to lead defence evidence.

10. Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the State, has urged before me that P.W.3 Marcelina, on being suspicious, had questioned P.W.1 Sofia regarding her pregnancy and Sofia had admitted the same to be true. According to him, the sequence of events clearly refer to the explanation for the delay in lodging the First Information Report. According to him, P.W.1 Sofia was aged about 13 to 14 years and, in such circumstances, she cannot be expected to have immediately disclosed about her pregnancy to her parents. The fact that she had gone and had asked the accused to marry her is a pointer to the fact that the accused was alone responsible for her pregnancy. According to him, the DNA test is not material for the charge of rape.

11. P.W.1 Sofia was a girl aged between 13 to 14 years at the time of the incident. The accused appears to have been friendly with P.W.1 Sofia. Initially he began to visit the house of Sofia and indulged in patting. The evidence of P.W.6 Jessy clearly

establishes that the appellant/accused used to visit the house of Sofia during the absence of her parents. Even P.W.1 Sofia has stated that the accused used to come to her house during the absence of her parents. P.W.1 Sofia has admitted that she was in love with the appellant/accused. There is nothing in the cross-examination, which would, in any way, lead the Court to draw an inference that the statement of P.W.1 Sofia, that the accused had sexual intercourse with her on five different occasions, is a false statement. It is a fact that P.W.1 Sofia did not inform her mother immediately on realizing that she was pregnant. Ours is an non-permissive society and a sense of shame as well as of fear of ostracism would prevent a minor girl from immediately informing her parents that she was pregnant. However, P.W.3 Marcelina, on suspecting that P.W.1 Sofia was pregnant, had questioned Sofia about it and Sofia had answered in the affirmative. No inference that the witnesses are speaking a falsehood can be drawn on the basis that P.W.3 Marcelina did not notice that P.W.1 Sofia was pregnant till about the fifth month of pregnancy. The parents of P.W.1 Sofia used to leave the house at about 8.00 in the morning and return after 6.00 p.m.. The fact that P.W.1 Sofia, before lodging the report, had informed the appellant/accused that she was pregnant and had asked him to get married to her is a pointer to the fact that the appellant/accused was the

father of the child in her womb. Undoubtedly there is delay in lodging the First Information Report. The First Information Report was lodged after nearly 6 months of the incident. The Court cannot be oblivious to the fact that a sense of shame and fear of ostracism may have prevented P.W.1 Sofia from immediately disclosing the fact of pregnancy to her parents. It is only when the appellant/accused refused to marry her that the First Information Report came to be lodged. In these facts, therefore, mere delay in the lodging of the First Information Report cannot enure to the benefit of the appellant/accused. It is highly unlikely, in these circumstances, that P.W.1 Sofia would falsely involve the appellant/accused. There is no material on record to suggest that the relations between P.W.1 Sofia and the appellant/accused were strained or inimical and even assuming that to be so, it is highly unlikely that she would falsely state the name of the appellant/accused as the father of her child. Though the DNA test ought to have been carried out, the non-holding of the DNA test is not fatal to the prosecution. The evidence of P.W.1 Sofia that the appellant/accused had intercourse with her, which resulted in her pregnancy, is sufficient to bring home the charge under Section 376 of the Indian Penal Code. Since P.W.1 Sofia, at the relevant time, was a minor and the fact that out of love she may have consented to have sexual intercourse, is of no avail to

the defence. Her consent, being the consent of a girl below 16 years, is wholly irrelevant. Therefore, in my considered opinion, the prosecution has proved the offence against the appellant/accused beyond reasonable doubt.

12. The learned trial Court has sentenced the appellant/accused to undergo 7 years of rigorous imprisonment. According to me, from the evidence on record, it is apparent that P.W.1 Sofia, being in love with the appellant/accused, had willingly submitted herself for sexual intercourse with the appellant/accused. Since on the date of commission of the offence she was below the age of 16 years, her consent is wholly immaterial. In these circumstances, therefore, according to me, the sentence of 7 years of rigorous imprisonment is extremely harsh and a sentence of imprisonment of 4 years would meet the ends of justice.

13. Criminal Appeal is partly allowed. The conviction of the appellant for the offence punishable under Section 376 is maintainable. However, the sentence of 7 years rigorous imprisonment is altered to a sentence of 4 years rigorous imprisonment. The sentence of fine remains unaltered. The appellant to surrender within 6 weeks from today. His bail bond

stands cancelled.

(P.V. HARDAS)
JUDGE.

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